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No. 00-139

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE PROJECT TO PROMOTE COMPETITION AND INNOVATION IN THE DIGITAL AGE ("PROCOMP") IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE

This brief is being submitted on behalf of the Project to Promote Competition & Innovation in the Digital Age ("ProComp"), an organization founded in 1998 by companies such as Sun Microsystems, Oracle, Netscape, and The Sabre Group for the purpose of analyzing competition and other policy issues relating to information technology.[1] ProComp's membership consists of a number of companies and trade associations with particular knowledge and expertise in markets relevant to the issues raised in *United States v. Microsoft*, Nos. 98-1232, 98-1233 (D.D.C.), and to the future of the information technology sector of the economy.

Given the particular knowledge of ProComp's members, ProComp is able to provide a unique perspective on two important issues before the Court: (1) the significance and public importance of this matter to the American economy; and (2) the critical importance of the swift resolution of this matter to the information technology sector.[2]

Members of amicus curiae ProComp participate in and are uniquely knowledgeable of information technology industries that are central to the health of the current economy. These companies understand the potential for continued harm to the information technology sector and the American economy as a whole absent the swift resolution of this matter.

SUMMARY OF ARGUMENT

The Court should retain jurisdiction of Microsoft Corporation's appeal from the judgment of the United States District Court for the District of Columbia.

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[1] No counsel for a party authored this brief in any part, and no person or entity, other than the amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. *See* SUP. CT. R. 37.6.

[2] All parties consented to the filing of this brief.

Congress amended the Expediting Act in 1974 to eliminate most direct antitrust appeals to this Court, but in Section 29(b) explicitly retained the presumption of direct appeal for cases such as this, cases so economically significant as to be of such "general public importance in the administration of justice" that swift and final resolution is highly desirable. 15 U.S.C. § 29. This case meets the statutory criteria precisely.

It is difficult, if not impossible, to imagine an antitrust case that *would* be appropriate for direct review under Section 29(b) if this case is not. To accept Microsoft's arguments is to determine, for all practical purposes, that Section 29(b) no longer exists.

The speed and finality with which this case is resolved will determine whether the antitrust laws will promote competition in high technology industries crucial to the economy as these laws have in previous eras of technological innovation and change.

Swift resolution is critical in light of the speed with which Microsoft can and has illegally walled off its operating systems monopoly from competitive challenge. Here, the burden imposed by the amended Expediting Act is light because the only important issues are legal rather than factual.

The government and the courts have invoked the Act only for the most momentous antitrust cases -- the AT&T cases, *California v. United States*, 464 U.S. 1013 (1983) and *Maryland v. United States*, 460 U.S. 1001 (1983), which determined the competitive landscape for the telephones on every business desk and in every home, and now this case, which will determine the competitive landscape for the most essential operations of the computers that sit on almost all business desktops and in an increasing majority of homes.

The need for immediate review is particularly striking here. The remedies having been stayed, Microsoft now

operates free from any constraints on its conduct, and predictably is continuing its efforts to extend its operating systems monopoly to engulf and destroy still more potential threats. Microsoft's strategy is to delay final judgment until it successfully eradicates another wave of potential competitors through the same tactics that correctly were condemned in the district court. Even after the trial, new predation is being undertaken. *See infra* pp. 10-12.

Were this Court to decline this appeal, Microsoft very well might prevail for all practical purposes no matter what result this Court eventually reached on certiorari two or three years hence. That is a risk that American consumers should not be forced to bear.

The controlling issues in this case, while of great public moment, are few and straightforward. The most important conclusion of the district court is that Microsoft employed a campaign of predatory conduct in order to monopolize and attempt to monopolize both personal computer operating systems and web browsers in violation of Section 2 of the Sherman Act. The reason price predation is rarely attempted and even more rarely successful, as noted by the Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), and *Brooke Group* v. *Brown & Williamson*, 509 U.S. 209, 226 (1993), is that the predator must typically lower price by increasing its rate of output and thereby incurs ever higher marginal costs. The predator thus suffers far greater losses than its intended victim.

In this case, however, marginal costs associated with distributing the browser are extremely small compared with the fixed costs of research and development for product development and improvement. The marginal cost curve, instead of rising with output, is virtually flat. This means that, marginal costs being de minimis, the predator and its victim spend equivalent amounts on fixed costs, and the company with the greatest financial reserves wins, driving the other out of the market. That is precisely what happened

when Microsoft gave its browser away, forcing Netscape to match its zero price. Since Microsoft had overwhelming financial superiority, it eliminated the Netscape browser's potential to compete directly with Microsoft's operating system.

The principle of predation here is the same as that in sham litigation cases in which the costs are equal for the predator and the victim. This Court's decisions in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), illustrate this principle of monopolization by sham litigation.[3] The economic rationale of predation there is the same as the rationale in Microsoft's case. There was, moreover, no efficiency gain from the behavior in the sham litigation cases, nor was there, the district court found, any such gain in Microsoft's giving away of its browser or in bolting the operating system and the browser together so that computer manufacturers had to take both.

Microsoft wanted to drive Netscape from the browser market, as the evidence makes clear, because the browser was capable not only of searching the Internet for information, but was also capable of becoming a platform to which applications could be written. That development would have meant, as Microsoft's internal memoranda show, that consumers and application writers would have been indifferent to what operating system underlay this new platform, thus rapidly eroding Microsoft's operating system monopoly.

Microsoft buttressed its bolting tactic by demanding exclusive dealing contracts with Internet access and content providers. Exclusive dealing is a poor tactic for gaining a

[3] These cases are not discussed for the purpose of defining the legal standard for sham litigation, most recently set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), but to illustrate the economic setting in which predation can occur and be successful.

monopoly but an excellent weapon for a company already holding a monopoly position. The customer has nowhere else to turn and so must deal exclusively or primarily with the monopolist.

The same desire to preserve its monopoly led Microsoft to impede Sun Microsystem's Java technology, software capable of working on all operating systems and thereby making the particular operating system a matter of indifference to consumers and application writers. Through a series of actions whose sole effect and purpose were to prevent the Java technology from enabling new operating system competitors, Microsoft impeded Sun Microsystem's Java efforts and thereby maintained the high barriers to entry. (District Court Findings of Fact, dated November 5, 1999 ("Findings of Fact") ¶ 407.)

Microsoft's assault on Netscape's Navigator and Sun's Java technology are illustrative of Microsoft's overall agenda of eliminating what the district court referred to as the "middleware threats."[4] (Findings of Fact ¶ 68.) Microsoft has followed similar strategies against Intel's Native Signaling Processing software, Apple's QuickTime technology, RealNetwork's multimedia playback technologies, and IBM's Notes and other software products. (Findings of Fact ¶ 78.) "Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist." (Findings of Fact ¶ 132.) "Microsoft feared all of these technologies because they facilitated the development of user-oriented software that would be

[4] Middleware technologies, such as Navigator and Java technology, operate on top of the underlying operating system and have the potential to support full-featured applications without regard to the technical characteristics of the underlying operating system. (Findings of Fact ¶¶ 68-69.)

indifferent to the identity of the underlying operating system." (Findings of Fact ¶ 78.)

These are not issues that require appellate review at a level below this Court. They are clear in economic terms and can be resolved by the application of well-known antitrust principles and precedent. There is every reason, therefore, for this Court to retain jurisdiction over the appeal Microsoft has filed.

ARGUMENT

I. CONGRESS PRESERVED APPELLATE JURISDICTION UNDER SECTION 29(b) PRECISELY FOR CASES LIKE THIS ONE

When the standards of Section 29(b) are met, as they are here, the presumption is that this Court will hear the appeal. Microsoft assumes that the standards for certiorari, and only those standards, apply here. (Microsoft Jurisdictional Statement, filed July 26, 2000 ("Microsoft J.S.") at 15-23.) Microsoft also asserts the Court's discretion here is "unfettered." (Microsoft J.S. at 16.) Both contentions are wrong.

In deciding whether to retain jurisdiction on an appeal under Section 29(b), the single determination this Court must make is whether the appeal is of "general public importance in the administration of justice." Neither the volume and complexity of the issues on appeal nor the standard for certiorari has any role in such a determination. It is the importance and exigency of the case that should work to keep a case in this Court. *See* H.R. REP. NO. 93-1463, at 13-14 (1974); *see also* R. STERN, ET AL., SUPREME COURT PRACTICE 53 (7th ed. 1993).

A. By Contrast With Certiorari Standards, Section 29(b) Presumes Appellate Jurisdiction

Under 28 U.S.C. § 1254, governing petitions for certiorari, this Court must affirmatively grant review. Under Section 29(b), by contrast, the Court must affirmatively deny

review. Thus, the presumption is that certiorari petitions will ordinarily be denied even if worthy of review by this Court, while the presumption is that review on direct appeal of a government antitrust case that meets Section 29(b) standards will ordinarily be granted.

That shifting of burdens was not coincidental. As the House Report explained, Congress preserved part of the Expediting Act precisely because, for these cases, it did not want the Court to have "free and absolute discretion to hear or not hear a case on direct review." H.R. REP. NO. 93-1463, at 13 (1974). Indeed, the Report took pains to distinguish the certiorari standard from that governing proceedings certified under Section 29(b). *See id.* at 13-14. If the case appealed in fact is "of general public importance in the administration of the antitrust laws," the express "inten[t]" of Congress is that this "Court hear [the] case[] on direct review." *Id.* at 14.

Microsoft recognizes that this case is exceptionally important to the economy. (*See* Microsoft J.S. at 30.) It cannot now contend to the contrary without contradicting its prior representations and also asserting the insignificance of the world's most valuable company, the software industry, and a monopolist's exclusionary conduct.

B. The Economic Importance Of This Case Is Obvious

Microsoft has stated of its monopoly product: "Windows is very important to the Nation's economy." (Microsoft's Summ. Resp. to Pl.'s Proposed Final J. ("Summ. Resp.") at 4 (D.D.C. May 10, 2000).) Indeed, in asserting the case's "significant . . . impact on the Nation's economy," Microsoft recognized that computing is the cornerstone of the global economy, and personal computers remain at the core of computing. More than one hundred million personal computers are sold each year, almost all of which run

Microsoft Windows.[5] (Microsoft J.S. App. at A60-A61.) Microsoft claims that "tens of thousands" of other market participants "have built their entire businesses on Windows." (Summ. Resp. at 4.) The "millions of consumers who use Microsoft's products," (*id.*), daily pay the price (in lost productivity) of Microsoft's suppression of innovation.

Since the initiation of the Department of Justice's lawsuit against Microsoft, Microsoft representatives have repeatedly stressed the significance of the high-tech industry to consumers and the American economy. For example, on Microsoft's website and in a television advertisement, Bill Gates stated that since its origin, the personal computer has "become a tool that has transformed our economy and had a profound effect on how we live and how our children learn."[6] Also according to Mr. Gates, the personal computer industry "has grown to generate one-quarter of America's real economic growth and 8% of its national output." Bill Gates, *Compete, Don't Delete*, THE ECONOMIST, June 13, 1998, at 19. Mr. Gates has also characterized the software marketplace as "an engine of economic growth in America."[7]

The issues in this case impact the overall software and Internet industries. As the district court found, software vendors are reliant upon Microsoft. (Findings of Fact ¶¶ 36-44.) They make strategic business decisions based on the operating system market and rely upon technical information

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[5] *The Best Is Yet to Come*, remarks by Bill Gates to WINHEC 2000, New Orleans, Apr. 25, 2000, <http://www.microsoft.com/billgates/speeches/04-25winhec00.htm>; *Gartner's Dataquest Says Worldwide PC Industry Experienced 15 Percent Growth in First Quarter 2000*, press release, Apr. 24, 2000, <http://gartner12.gartnerweb.com/dq/static/about/press/pr-b200019.html>.

[6] *New TV Ad Communicates Microsoft's Commitment to Innovation*, Microsoft PressPass website, April 6, 2000, <http://www.microsoft.com/PressPass/features/2000/04-06tv.asp>.

[7] *Microsoft Press Conference Responding to Final Judgment in Government's Antitrust Case*, Microsoft PressPass website, June 7, 2000, <http://www.microsoft.com/PressPass/trial/jun00/06-07pressconf,asp>.

from Microsoft. *Id.* Software vendors are entitled to know whether Microsoft will continue to dominate the operating system or whether they will have the opportunity to work with other operating system companies.

Moreover, this case may decide the future of Internet computing. Monopolizing the browser not only protected the operating system monopoly but also gave Microsoft control over the browser software that serves as the universal interface between users and the Internet. If Microsoft can control all access to the Internet, that might be the most important and damaging monopoly in history. The outcome of this case may substantially affect the nation's economic well being.

C. Timely Resolution Of This Case Is Critical To Minimize Competitive Harm And Provide Certainty In Significant Markets

The need for immediate resolution is beyond serious dispute. Microsoft itself insists that software markets move at a "lightening [*sic*] pace." (Microsoft Mem. Supporting Proposed J. at 10 (May 10, 2000).) Because the district court stayed the entire remedy in this case, Microsoft remains free to insulate and expand its monopoly position by choking off competitive threats with the very tactics held illegal here. Swift and final resolution is therefore vital.

First, consumers and other industry participants are entitled to immediate relief from the ill effects of the illegal maintenance of Microsoft's monopoly position. Microsoft's durable monopoly over personal computer operating systems remains intact, and its share of that market continues to grow.[8] (*See* Microsoft J.S. App. at A60.) The progress of

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[8] Microsoft's market share for personal computer operating systems remains overwhelming. (Findings of Fact ¶ 35.) The Linux operating system remains almost non-existent on desktop personal computers and is unlikely to induce a sufficient number of software vendors to develop applications running on Linux. (Findings of Fact ¶

the market in the two years since this case was filed demonstrates that Microsoft can choke off competitive threats to its operating systems monopoly and destroy competition in adjacent markets in a very short time. When this action was filed in May 1998, Microsoft's market share of Internet browsers was about forty percent. The evidence at trial, from later that year, showed a share barely exceeding fifty percent. The most recent estimates based on actual browser usage reflect an eighty-six percent share. *See Microsoft Share Surges in Web Browser Market*, WALL. ST. J., June 27, 2000, at B8. That rapid monopolization occurred primarily because new computers with a browser bolted onto the operating system replaced older computers.

Remanding this case would delay its final resolution for at least one year, and more likely for two or three years. The en banc court of appeals is unlikely to decide the case in less than a full year from the ordering of a briefing schedule. In all likelihood, the proceedings on petition for certiorari would carry over into early 2002, so that this Court would not be able to review the decision of the court of appeals until October Term 2002, and would decide it in mid-2003.

The additional years of delay would have several deleterious effects. First, there is a substantial cost to consumers deprived of the benefits of competitive markets. Second, potential competitors and investors need to know whether the antitrust laws will constrain Microsoft from abusing its operating systems monopoly to destroy competitive threats. Postponing final review would prolong their uncertainty and prevent them from making informed economic decisions.

50.) Similarly, other potential competitors do not pose a viable restraint on Microsoft's exercise of monopoly power. (Findings of Fact ¶¶ 47-49 & 53-56.) Consequently, Microsoft's monopoly power continues to harm consumers through reduced innovation and to harm other market participants by restraining competition. (Findings of Fact ¶¶ 408-412.)

Third, while all remedies are stayed, Microsoft may continue to exploit its monopoly and use similar tactics to destroy additional competitive challenges and to extend its monopoly into adjacent markets. In particular, Microsoft has incentives to extend its power into operating systems for handheld devices and servers. Similar to browsers, software that reside on these alternative platforms may evolve into threats to Microsoft's monopoly in operating systems for desktop personal computers. (Decl. of Rebecca M. Henderson in Supp. of Proposed Gov't Remedy, Apr. 28, 2000, ¶ 37; Decl. of Paul M. Romer in Supp. of Proposed Gov't Remedy, Apr. 27, 2000, ¶ 31.) Microsoft has already taken steps to increase its market power over operating systems for handheld devices as well as those for servers. On July 11, 1999, Bill Gates instructed his staff to demonstrate how Microsoft's handheld software connects to other Microsoft software better than competition's handheld software. (District Court Gov't Ex. Remedy 1.) Mr. Gates proposed that Microsoft reconfigure certain functions in Microsoft Outlook so that they run only with Microsoft's software for handheld devices. *Id.* Similarly, with respect to operating systems for servers, Microsoft is already using security protocols that discourage the use of non-Microsoft servers in enterprises that have installed Windows 2000 on desktops. (Decl. of R. Henderson ¶ 49; Decl. of Edward W. Felten in Supp. of Proposed Gov't Remedy, Apr. 28, 2000, ¶¶ 78-79; and, Decl. of P. Romer ¶ 35.)

Further, Microsoft is binding a streaming media player with Windows. Andrews, *Microsoft Picks Next Battle With Media Player 7*, SEATTLE TIMES, July 17, 2000. Microsoft considered a rival streaming media vendor to be "an OS [*i.e.*, operating systems] contender" by virtue of its middleware characteristics. (District Court Gov't Ex. 1368; *see also* Microsoft J.S. App. at A94-A99.) Microsoft's latest initiative uses monopoly control over the browser and the operating system to make all software dependent on a

proprietary "Microsoft.NET" platform embracing server computers as well as client desktop computers and handheld devices. *See generally* Microsoft Corp., White Paper, *Microsoft.NET: Realizing the Next Generation Internet* (June 2000) .

II. THIS COURT CAN EFFICIENTLY AND PROMPTLY RESOLVE THIS APPEAL

The Court should retain this appeal for the additional reason that the genuine issues are few and clear as well as matters of fundamental antitrust policy. This Court is perfectly well-equipped to decide those issues.

The controlling issues consist of basic law and economics. Microsoft's position throughout has been that the nature of the software industry requires alteration or abandonment of those principles and the prior Supreme Court decisions that embody them. This Court can and should answer that contention rapidly and decisively. Review by the court of appeals could add very little to this Court's analysis.

Microsoft's tactics followed a consistent, well-established principle of monopolization, that of using a range of exclusionary conduct to foreclose competitive threats. This case is unusual only because there is so much direct evidence, much of it in explicit Microsoft internal communications, that clarifies Microsoft's intentions and conduct. These documents were not the customary braggadocio and bluster commonly found in the files of fierce competitors. Rather, the company's top executives, including Chairman Bill Gates, laid out explicit plans to destroy Netscape's browser and then executed those plans to perfection. These were not the expressions of animal spirits but a roadmap to successful predation.

There is no ambiguity about the anticompetitive nature of Microsoft's conduct, or about the complete absence of any valid efficiency justifications for Microsoft's wide-ranging

exclusionary activity. *See Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1984) *aff'd*, 472 U.S. 585 (1985).

At the core of almost every significant episode of monopolistic conduct in the record is Microsoft's manipulation of the indisputable need of industry participants for access to the Windows operating system. That is what this Court condemned in *Lorain Journal* v. *United States*, 342 U.S. 143 (1951). Like Microsoft, the monopolist in *Lorain Journal* refused to supply an "indispensable medium" except in a way that foreclosed nascent competition from a small company with a competing technology. Like Microsoft, the monopolist in *Lorain Journal* failed to prove an efficiency justification for its conduct, and this Court therefore condemned that conduct as the district court condemned Microsoft's activity.

The conduct condemned in this case went beyond the use of predatory contract terms. Microsoft's most dramatic tactic, the incorporation of the Internet Explorer browser into the monopoly Windows operating system, served the same purpose. That tactic differed from the predatory conduct alleged in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group* v. *Brown & Williamson*, 509 U.S. 209 (1993). Unlike those cases, in which gaining a monopoly and recouping the costs was highly speculative, here the expected reward from the predation came from the maintenance of an existing, highly profitable monopoly. The fact of minimal marginal costs and the enormous disparity in financial resources made predation even more feasible here as it was not in the prior cases.

The primary significance of the bolting together of Windows and Internet Explorer is found not in tying doctrine under Section 1 of the Sherman Act, but rather under principles of monopolization under Section 2. Because the district court found, with ample record support, that this

bundling was neither undertaken for nor justified by efficiency concerns or other "valid business reasons," *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 483 (1992), the conduct was properly condemned. *See Aspen*, 472 U.S. at 608.

Microsoft intends to argue that its conduct could not violate Section 2 of the Sherman Act unless each particular instance or variety of exclusionary conduct, viewed alone, constituted a Section 2 violation — and may argue even that conduct must constitute an independent Section 1 violation in order to violate Section 2. (Microsoft J.S. at 22.) But a series of actions, each small in itself, may keep a monopoly safe from competition by forestalling avenues of competitive challenge one by one. This Court in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), made unmistakably clear that a monopolist cannot evade liability for a coordinated campaign of illegal monopolization on the ground that each act in isolation might not constitute a Section 2 violation. As the Court confirmed in *Aspen*, monopolization analysis frequently requires an examination of the validity of the "efficiency justification" for an entire "*pattern* of conduct" that forecloses competition, 472 U.S. at 608, not an artificial parsing of each act as if its anticompetitive effects bore no relation to its context.[9] To impose on some conduct the additional requirement that it first violate Section 1 in order to violate Section 2 would disregard the accepted principle that the conduct of a monopolist is viewed through a "special lens" differing from that used for parties without monopoly power. *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing 3 P. AREEDA & D. TURNER, ANTITRUST LAW § 813, at 300-302 (1978)).

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[9] Indeed, the defendant in *Aspen* had contended that its pattern of conduct could not be condemned under § 2 unless each element was independently illegal. *See Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1522 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

Microsoft contends that two judges on the D.C. Circuit worked a sea-change in antitrust law and analysis. (Microsoft J.S. at 4-5.) The issue before the court in *United States* v. *Microsoft*, 147 F.3d 935 (D.C. Cir. 1998), however, was entirely procedural: whether in a consent decree proceeding a preliminary injunction could be issued without notice or hearing. The full panel held that it could not. *Id.* at 938. The majority went on, however, to suggest that in the consent decree case, it was enough if Microsoft ascribed "facially plausible benefits to its integrated design." *Id.* at 950. This discourse was entirely dicta. The district court had not held hearings on the combining of the operating system and browser, there were no findings of fact, no record, and no briefing of the question in the court of appeals. The panel majority warned that its discussion was not final even in the consent decree litigation, *id.* at 952, much less in the coming Sherman Act trial. *Id.* at 950 & n.14. The majority emphasized that "[t]he guidance this opinion seeks to provide is limited to setting out the legal framework for analysis. The ultimate sorting out of any factual disputes is a different question, and one we of course cannot resolve on the limited record before us." *Id.* at 951, n.15.

The majority observed that "[m]anufacturers can stick products together in ways that purchasers cannot without the link serving any purpose but an anticompetitive one. The concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." *Id.* at 949.

While a degree of judicial modesty in the face of technological complexity is appropriate, this Court has often engaged in the necessary analysis when issues such as those common in patent and antitrust litigation call for it. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), decided the separability of anesthesiology from other hospital services and the comparative benefits of offering the

two together or separately. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985), decided that there was no efficiency justification for defendant ending the practice of offering passes good on both companies' mountains, and thus, the behavior was predatory.

The D.C. Circuit panel majority's dicta are not controlling or even persuasive on the record now made in this case, nor did the panel majority say that its dicta should be controlling. Microsoft can gain no comfort from that very different case, and the dicta are no reason for this Court not to retain jurisdiction now.

Microsoft complains that this case moved too quickly, (Microsoft J.S. at 4-6), although more than two years passed between the filing of the Complaint and the Final Judgment. Swift resolution of antitrust claims is essential if the antitrust laws are to provide an effective curb on anticompetitive activity in software markets where a span of four or five years for trial and appeals is an eternity. If significant antitrust cases cannot be brought, and relief cannot be obtained, far more quickly, the substantive law of antitrust becomes largely irrelevant because it is practically unenforceable. After several years, competitors' opportunities dissipate, consumers are locked in, and wrongdoers are strengthened by ill-gotten gains. The district court provided a fair trial, and that is all that matters.

Immediate review is also appropriate because the controlling issues are well-framed and made perfectly clear by the district court's 412-paragraph Findings of Fact and the conclusions of law[10] which follow inexorably from those findings. There will be no difficulty in identifying and deciding the issues actually presented on appeal.

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[10] Section 29(b)'s restriction to cases in which equitable relief was sought reflects a recognition that expedited consideration is particularly appropriate where the Court need not guess at what a jury found significant in reaching a general verdict.

Certainly the fact that the district court's Findings of Fact did not cite the record presents no special difficulty. Microsoft will marshal evidence that, it contends, renders a finding clearly erroneous. The plaintiffs will marshal the evidence supporting the finding. Each party will cite the evidence and findings in the Joint Appendix. The Court's task will be neither complicated nor difficult.

The Court should not be distracted by the array of challenges that Microsoft suggests it will raise on appeal. That list of potential issues, (Microsoft J.S. at 21-23), bears little resemblance to the issues that actually will be dispositive. The factual challenges that Microsoft enumerates are largely frivolous in light of the supporting material in the record (often in admissions by Microsoft documents). Such challenges are likely to be susceptible of rapid resolution because the clear error standard prevents this Court from "revers[ing] the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). The findings need only be "plausible in light of the record viewed in its entirety," *id.* at 574, a conclusion that severely understates the strength of the Findings of Fact in this case. In any event, very few of the factual challenges bear on the question of liability.

Similarly, because a court, not a jury, found the facts in this case, disputes over the admissibility of evidence lack significance. As this Court has observed, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981). A reviewing court simply decides the appeal "as if [the inadmissible evidence] was not in the record." *Sinclair* v. *United States*, 279 U.S. 749, 767 (1929) (quoting *United States* v. *King*, 48 U.S. (7 How.) 833, 855 (1849)).

Microsoft belabors the raw size of the trial record in an apparent effort to convince the Court that this case is too

much trouble, no matter what the relevant jurisdictional statute says. *Any* case that is of exceptional importance to the national economy and to the administration of the antitrust laws — any case that meets the standards of Section 29(b) — will usually involve a large record and the resisting party will be able to spin out many *potentially* appealable issues.

This Court repeatedly has demonstrated an ability to resolve important issues on records at least as complex as the record in this case. Before the Expediting Act was curtailed in 1974, this Court heard between two and four direct appeals of government antitrust cases every Term. Many of the most important antitrust doctrines were explicated in such cases, and many of those cases involved records of exceptional size and great complexity.[11] As Microsoft points out, many Justices objected to the burden of hearing direct appeals of every routine government antitrust case. But Congress responded to those concerns, *not* by eliminating direct appeal jurisdiction in government antitrust cases, but by limiting that jurisdiction to the most important cases. The burden of adding a direct appeal of an extraordinarily significant case to this Court's current docket every decade or so bears no resemblance to what the Court faced before the 1974 amendment.

Indeed, since 1974, this Court has repeatedly demonstrated its ability to resolve important cases presenting a multitude of issues on bulky records. These include massive administrative cases such as *FDA* v. *Brown & Williamson Corp.*, _ U.S. _, 120 S. Ct. 1291 (2000), and

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[11] *E.g.*, *United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656, 658 (1974) ("lengthy trial [resulting in] extensive findings and conclusions"); *United States* v. *Marine Bancorp., Inc.*, 418 U.S. 602, 616 & n.13 (1974) ("extensive record"); *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974) ("thousands of pages of transcript and hundreds of exhibits").

original matters such as *Arizona* v. *California*, _ U.S. _, 120 S. Ct. 2304 (2000). The records of two of the most important private antitrust cases taken on certiorari put this case in proper context. The *Matsushita* case involved a forty-volume appendix. 475 U.S. at 577. That appendix was based on a district court record that comprised, among other things, a "17,000 page final pretrial statement" and "250,000 documents, the originals of many of which [we]re in Japanese." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 1137 (E.D. Pa. 1980), *aff'd in part & rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986). More recently, in deciding *Brooke Group*, this Court confronted the "voluminous" record of a "115-day trial," 509 U.S. at 243-44, including "2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses." *Id.* at 254. But in that private case this Court nonetheless undertook the task of "review[ing] the sufficiency of the evidence" itself in order to "avoid[] the systemic costs associated with further proceedings" in the lower court. *Id.* at 230.

These were private cases and, given the mandate of section 29(b), this case much more clearly warrants immediate review by this Court.

CONCLUSION

The appeal should be accepted and set down for full briefing and argument.

Respectfully submitted,

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